STATE OF MICHIGAN

COURT OF APPEALS

ALISKA MALISH, Plaintiff-Appellee, v WLADIMIRO MARCELLI, Defendant-Appellant.	UNPUBLISHED September 19, 2017 No. 337990 Oakland Circuit Court LC No. 2015-827299-DM

Before: BECKERING, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

In this custody dispute, defendant appeals by right the trial court's order denying defendant's motion to change custody, parenting time, domicile, and school enrollment for the minor child, AM, and granting plaintiff's request for attorney fees and costs as a sanction for having to respond to defendant's motion. We affirm.

Defendant first argues that the trial court's decision that there had not been proper cause or a change of circumstances without first holding an evidentiary hearing was both a clear legal error and against the great weight of the evidence. We disagree.

There are three standards of review in custody cases. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003). "Findings of fact . . . are reviewed under the 'great weight of the evidence' standard." *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011). Under this standard, "a reviewing court should not substitute its judgment on questions of fact unless they clearly preponderate in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (internal quotations omitted). The trial court's discretionary rulings are reviewed for an abuse of discretion. *Dailey*, 291 Mich App at 664. "In child custody cases, an abuse of discretion occurs if the result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Maier v Maier*, 311 Mich App 218, 221; 874 NW2d 725 (2015) (citation, brackets, and internal quotations omitted). "Lastly, the custody act provides that questions of law are reviewed for 'clear legal error.' " *Fletcher*, 447 Mich at 881, quoting MCL 722.28. A trial court commits "clear legal error" where it "incorrectly chooses, interprets, or applies the law[.]" *Id*. In sum, in a child-custody dispute, "all orders and judgments of the circuit court shall be affirmed on appeal

unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28.

In Michigan, the Child Custody Act, MCL 722.21 *et seq*., "applies to all circuit court child custody disputes and actions, whether original or incidental to other actions." MCL 722.26(1). When presented with a motion to modify custody, the trial court is only permitted to actually consider the change in custody "if the movant establishes proper cause or a change in circumstances." *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011); MCL 722.27(1)(c). This requirement is intended "to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). "Accordingly, a party seeking a change in the custody of a child is required, as a threshold matter, to first demonstrate to the trial court either proper cause or a change of circumstances." *Id*.; MCL 722.27(1)(c).

This Court has held that "to establish a 'proper cause' necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court." *Vodvarka*, 259 Mich App at 512. This Court clarified that requirement by specifying that an "appropriate ground" is typically "relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being." *Id*. When considering the alternate possibility of a "change of circumstances," a trial court is required to view how the situation of the child has changed since the last custody order. *Id*. at 513-514. Specifically, "a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513. This Court clarified that not just any change would satisfy this standard because "there will always be some changes in a child's environment, behavior, and well-being." *Id*. Rather, a moving party "must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id*. at 513-514. The relevance of the facts and circumstances of each case must be "gauged by the statutory best interest factors." *Id*. at 514. A court may consider evidence of the circumstances that existed at or before entry of the prior custody order, but only for comparison purposes. *Id*. The "change of circumstances" necessary to revisit a custody order must have occurred after its entry. *Id*.

In this case, the last prior custody order was the February 22, 2016 judgment of divorce. We must consider whether defendant established by a preponderance of evidence proper cause or a change in circumstances to warrant a review of the trial court's prior order. *Id*. 512-514.

The record reveals that most of defendant's complaints existed before, or were stipulated to, in the previous custody order the trial court entered, i.e., the judgment of divorce. One of the main issues defendant raised was that AM was being harmed by having to move to Canada. The trial court entered a temporary order allowing plaintiff to move to Canada with AM in July 2015. Defendant moved the trial court to reconsider, arguing that AM's immigration status and possibility of obtaining citizenship in the United States was harmed by that order. Later, in October 2015, defendant moved the trial court to change AM's parenting time schedule so that he could spend more time in Michigan. In that motion, defendant alleged that AM had started to appear depressed, had lost weight, and was regularly ill since moving to Canada in July. Despite

those arguments, defendant signed a consent judgment of divorce in February 2016, which placed AM's domicile in Canada under largely the same parenting time agreement that had previously existed. Considering those facts, we find it is clear that defendant believed that AM's immigration and citizenship status in the United States was at risk and that AM was showing signs of illness and anxiety caused by moving to Canada by October 2015, months before the most recent custody order was entered in February 2016. Consequently, the trial court did not err in finding that defendant, with respect to those arguments, was unable to "prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Vodvarka*, 259 Mich App at 513.

Similarly, defendant's argument regarding AM's situation at school in Canada, specifically the issue with regard to a threat related to guns, also pre-dates the entry of the judgment of divorce. The evidence defendant provided of the incident, which were e-mails involving an alleged school official and which only had defendant raising the issue of a gun, were sent in January 2016. Notably, that again was before the February 2016 judgment of divorce was entered. For the same reasons just stated, this incident does not show a change of circumstances or proper cause because it pre-dated the most recent custody order. *Id*. at 512-514.

Defendant also alleged concerns regarding plaintiff's handling of AM's dental needs, treatment of tip-toe walking, and a teacher's strike at AM's school in Canada. To support a change in custody, "the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child[.]" *Id*. at 513. Stated differently, "normal life changes typically are insufficient to establish the proper cause or change in circumstances required to proceed to consideration of a child custody order[.]" *Lieberman v Orr*, ___ Mich App ___, ___; ___ NW2d ___ (2017), slip op at 8. Furthermore, the change must have or be capable of having "a *significant* effect on the child's well-being[.]" *Vodvarka*, 259 Mich App at 513.

In support of his arguments, defendant provided e-mails revealing that he and plaintiff disagreed regarding the proper method to treat AM's dental and medical issues. The trial court reasoned that those disagreements were common among parents that shared legal custody of a child, but they did not rise to the standard for a finding of proper cause or change of circumstances. Rather, medical and dental issues arising in a minor child's life are "the normal life changes" that one would expect. Furthermore, it is unclear how the Canadian teacher's strike would have or did have a significant effect on AM's well-being. Defendant's allegations were not that AM was not being taught at school, but merely that his report card did not contain the teacher's specific review of AM's performance. Besides defendant's feelings that he is being left out of information pertaining to AM's progress, there were no allegations that the lack of a review would have any effect on AM's well-being. Given that defendant's allegations that related to changes that occurred after the February 2016 judgment of divorce were limited to issues that were merely normal life changes (medical and dental issues) or would not have a significant effect on AM's well-being (teacher's strike), we agree that the trial court's finding that there was not proper cause or a change of circumstances was not against the great weight of the evidence. *Dailey*, 291 Mich App at 664.

Defendant also argues that the trial court should have held an evidentiary hearing and that its failure to do so violated MCR 3.210(C)(8) and MCR 3.210(D)(1). We disagree. The proper cause or change of circumstances provision exists specifically "to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Corporan*, 282 Mich App at 603. Moreover, this Court has opined that although determining whether proper cause or change in circumstances exists "will be based on the facts particular to each case, we do not suggest that an evidentiary hearing is necessary to resolve this initial question." *Vodvarka*, 259 Mich App at 512. The *Vodvarka* Court noted that "often the facts alleged to constitute proper cause or a change of circumstances will be undisputed, or the court can accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard." *Id*. The trial court in this case examined defendant's allegations and determined that they did not pertain to issues arising after the most recent custody order; so they could not establish proper cause or a change of circumstances, even if true. And, even if AM were having medical and dental issues and his Canadian teachers were on strike, those facts still did not give rise to proper cause or a change of circumstances. Given that determination, the trial court was not required to hold an evidentiary hearing on defendant's motion. As such, it was not clear error for the trial court to fail to do so. *Id*.

Defendant next argues that the trial court erred in awarding plaintiff attorney fees and costs as a sanction. We disagree.

"This Court reviews a trial court's award of attorney fees and costs for an abuse of discretion." *Souden v Souden*, 303 Mich App 406, 414; 844 NW2d 151 (2013). The trial court commits an abuse of discretion when its decision falls outside the range of reasonable and principled outcomes. *In re Foster Attorney Fees*, 317 Mich App 372, 375; 894 NW2d 718 (2016). "We review for clear error the trial court's determination whether to impose sanctions under MCR 2.114." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). "A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Id*.

"MCR 2.114(E) states that the trial court 'shall' impose sanctions upon finding that a document has been signed in violation of the rule. Therefore, if a violation of MCR 2.114(D) has occurred, the sanctions provided for by MCR 2.114(E) are mandatory." *Guerrero*, 280 Mich App at 678. In regards to sanctions, MCR 2.114(D) provides:

> The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> > (1) he or she has read the document;
> >
> > (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

"If a document is signed in violation of [MCR 2.114]" a court must impose sanctions that "may include an order to pay the other party or parties the amount of the reasonable expense incurred because of the filing of the document, including reasonable attorney fees." MCR 2.114(E).

Although the trial court did not specifically announce which subsection of MCR 2.114(D) it believed had been violated, the record appears clear that the issue was with MCR 2.114(D)(3). The trial court's primary concern regarding defendant's motions was with the form and content, not necessarily whether defendant believed them to have merit. Defendant first submitted a motion that was 32 pages long, not counting several sets of lengthy, narrative style "exhibits" that were essentially a continuation of the motion itself, in violation of MCR 2.119(A)(2), which limits motions and brief to a combined 20 pages. The trial court also announced on the record that defendant had submitted several documents to the trial court itself, which included highlighted and handwritten notations, which were not provided to plaintiff, constituting an ex parte communication with the trial court. When the trial court dismissed defendant's motion for being in violation of the court rules, defendant merely changed the form of his pleadings to match the court rules. Specifically, defendant did not actually curtail the length of the motion; he simply disguised the lengthy motion as a motion with an attached 23 page affidavit. Both motions contained approximately 150 pages in exhibits, some of which related back to 2009—before AM was even born. During the hearing, the trial court further noted that defendant had filed a similar motion and exhibits with the friend of the court.

Under the circumstances, the trial court did not clearly err in determining that defendant filed his motions and briefs in an attempt "to harass [plaintiff] or to cause unnecessary delay or needless increase in the cost of litigation[.]" MCR 2.114(D)(3). Indeed, the trial court itself commented on the amount of time it took to parse through defendant's motions and exhibits, and plaintiff's attorney reported that it was an almost Herculean task to go through every line and allegation with plaintiff and to fashion a response. It was reasonable for the trial court to determine that because defendant continued to file the same motions and exhibits even after the trial court's warnings, defendant was doing so to harass plaintiff or to unnecessarily raise the cost for her to litigate the case. MCR 2.114(D)(3). Consequently, we are not left with a definite and firm conviction that the trial made a mistake by imposing sanctions under MCR 2.114. *Guerrero*, 280 Mich App at 677.

Defendant alternatively argues that the trial court should have held an evidentiary hearing to determine the reasonableness of plaintiff's claimed attorney fees. Defendant is correct that, generally, when attorney fees are contested, "it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005). However, a "failure to request an evidentiary hearing constitute[s] a forfeiture of the issue." *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002). In this case, while defendant challenged whether sanctions were proper, he did not challenge the calculation or reasonableness of the

attorney fees ordered by the trial court. As a result, because the attorney fees and costs ordered were not "contested" and because defendant did not request an evidentiary hearing, the issue is forfeited. *Id*.; *Reed*, 265 Mich App at 166.

Lastly, defendant requests that this Court exercise its equitable power pursuant to MCR 7.216(A)(7) to remand the case to a different judge. We decline to do so.

It is undisputed that this Court has the equitable power to "enter any judgment or order or grant further or different relief as the case may require." MCR 7.216(A)(7); *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 431-432; 711 NW2d 421 (2006). This Court has previously exercised that power to remand a case to a different judge when the assigned judge has shown "substantial prejudice" toward a party. *Hawkins v Murphy*, 222 Mich App 664, 674; 565 NW2d 674 (1997), superseded by statute on other grounds as stated in *Glaubius v Glaubius*, 306 Mich App 157, 174; 855 NW2d 221 (2014). The primary concern is the trial court's need to maintain the appearance of justice. *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992).

"A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise." *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). "An actual showing of prejudice is required before a trial judge will be disqualified." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). Judicial "disqualification is not warranted unless the bias or prejudice is both personal and extrajudicial." *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). So, "the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceedings." *Id*. Further, opinions that a judge forms on the basis of evidence introduced or events occurring during a proceeding, or a prior proceeding, do not constitute grounds for finding bias or partiality unless they display a deep-seated favoritism or antagonism that would render fair judgment impossible. *Id*. at 496 (citation omitted).

The record reveals that defendant's complaints arise entirely from the trial court's denial of his motion to change custody, parenting time, school enrollment, and domicile and the trial court's award of attorney fees to plaintiff. As discussed, those decisions were not improper. Furthermore, the trial court's harshness toward defendant during the hearing on his motion arose out of evidence introduced or events occurring during the course of the proceedings. Indeed, there was no evidence that the trial court had any "personal and extrajudicial" bias toward defendant. *Cain*, 451 Mich at 495. Instead, the trial court expressed frustration with defendant for continuously filing motions that were partly irrelevant and usually in violation of the court rules. Such rulings cannot be the basis for disqualification because of bias or partiality " 'unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.' " *Id*. at 496 (citation omitted). The record as a whole shows that the trial court did not exhibit bias toward defendant. Evidence that the trial court grew frustrated with defendant due to his *in propria persona* motion practice is not evidence of "deep-seated favoritism or antagonism that would make fair judgment impossible." *Id*.

Consequently, because the trial court's decisions were proper, and there was no evidence of bias against defendant, we decline defendant's request to remand to a different trial judge pursuant to MCR 7.216(A)(7).

We affirm. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Michael J. Riordan